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ON THE TRANSFER OF TECHNOLOGY

NEGOTIATIONS ON AN INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY

Report by the Secretary-General of UNCTAD

The present report by the Secretary-General of UNCTAD on the above subject is submitted to the General Assembly at its fiftieth session as requested in paragraph 2 of its resolution 48/167 of 21 December 1993.

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I. INTRODUCTION

1. The background to the negotiations on an international code of conduct on the transfer of technology, as well as the consultations carried out by the Secretary-General of UNCTAD since the eighth session of the United Nations Conference on Trade and Development in 1992, were covered in the previous report of the Secretary-General of UNCTAD to the General Assembly.[1] Suffice it to recall that at UNCTAD VIII, the Conference "having reviewed the work carried out in the negotiations on an international code of conduct on the transfer of technology and the lack of agreement in the recent consultations on this subject", recognized "that the conditions do not currently exist to reach full agreement on all outstanding issues in the draft code of conduct. Should Governments indicate, either directly or through the Secretary-General of UNCTAD reporting according to General Assembly resolution 46/214, that there is the convergence of views necessary to reach agreement on all outstanding issues, then the Board should re-engage and continue its work aimed at facilitating agreement on the Code".[2]

2. The General Assembly, in its resolution 48/167 of 21 December 1993, reiterated "that the conditions do not currently exist to reach full agreement on all outstanding issues in the draft international code of conduct on the transfer of technology" and invited "the Secretary-General of UNCTAD, based on the relevant provisions of the Cartagena Commitment and taking into account the findings of the Ad Hoc Working Group on the Interrelationship between Investment and Technology Transfer, to report to the General Assembly at its fiftieth session on the state of the discussion". The present report, prepared in accordance with the said resolution, reviews recent developments of relevance to the state of the discussions of the draft code of conduct and considers options regarding the future course of action in this area.

II. RECENT DEVELOPMENTS OF RELEVANCE TO THE STATE OF DISCUSSION ON THE DRAFT CODE OF CONDUCT

A. *UNCTAD's Ad Hoc Working Group on the Interrelationship between Investment and Technology Transfer*

3. Pursuant to the Cartagena Commitment, the Trade and Development Board established the Ad Hoc Working Group on the Interrelationship between Investment and Technology Transfer.[3] The Group identified three main issues for examination and discussion: investment flows, transfer of technology and competitiveness; technological capability-building in developing countries, particularly least developed countries and in countries undergoing the transition to a market

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[1] See "Negotiations on an international code of conduct on the transfer of technology", *report by the Secretary-General of UNCTAD* (TD/CODE TOT/59) submitted to the forty-eighth session of the General Assembly.

[2] "A New Partnership for development: The Cartagena Commitment", see *Proceedings of the United Nations Conference on Trade and Development, Eighth Session, Report and Annexes* (TD/364/Rev.1) (United Nations Publication, Sales No. E. 93.II.D.5), para. 173.

[3] Board decision 398 (XXXVIII).

economy; and transfer and development of environmentally sound technologies.[4] In examining these issues, the Group referred to different, though interrelated, questions which included: the role of the State; policies to promote technology and investment flows and technological innovation; human resources development and institution-building; mechanisms of technology transfer; intellectual property protection; factors affecting competitiveness; and the role of enterprises.

4. Within its work programme, the Group considered a report by the UNCTAD secretariat entitled "Laws and regulations dealing with the transfer and development of technology: an overview".[5] The secretariat's report highlights that technology advances and their rapid diffusion, especially in the area of information, have contributed to the creation of new markets and the transformation of innovation and production processes.

5. These changes and the attendant shift towards global competition require a continual search for alternative strategies by enterprises and for improved policy instruments by Governments that would enable them to respond more effectively to the new world environment. Consequently, considerable attention has been given in recent years to the creation of a legal environment conducive to technology transfer and development. This has led a number of Governments to formulate laws and regulations relating to the transfer, development, adaptation and diffusion of technology. Most developed countries have introduced changes in their competition laws and enforcement policies on restrictive practices in order to stimulate technological innovation, and have passed laws to protect new technologies. The main focus in developing countries has been on the formulation of policies and legislative instruments for the promotion and encouragement of foreign investments and related technology transfer. Many developing countries have liberalized their investment regime and technology transfer legislation in order to attract more foreign investment. The main approach taken by those countries towards technology transfer has been to focus on effective collaboration between partners involved in transfer arrangements rather than on the control of the contractual aspects of transactions. More recently, a number of developing countries have also modified their intellectual property legislation to strengthen protection of intellectual property rights or to introduce new enforcement measures.

6. In discussing the above issues and analysing relevant empirical evidence, the Working Group, without putting forward any prescriptive solutions, offered for consideration a series of findings and conclusions.[6]

7. One of the main findings of the Group was that the world was very different from that which had prevailed two or three decades ago when an inward-oriented and State-led industrialization strategy had been the dominant approach adopted by many countries. Increasing liberalization trends, adoption and implementation of structural adjustment programmes, changes in the international division of labour and greater cooperative arrangements among enterprises have, in a period of rapid technological change, created a new setting for investment and technology flows.

8. Recognizing that technology was vital for achieving economic development

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[4] Report of the Ad Hoc Working Group on the Interrelationship between Investment and Technology Transfer on its first session (TD/B/39(2)18, TD/B/WG.5/4).

[5] TD/B/WG.5/10.

[6] Final report on the Ad Hoc Working Group on the Interrelationship between Investment and Technology Transfer to the Trade and Development Board (TD/B/40(2)/17, TD/B/WG.5/12), paragraphs 8-29.

and sustaining competitiveness, the Group found that the process of gaining technological capability was not instantaneous, costless or automatic, even if the technology was well diffused elsewhere. Apart from physical inputs, it would call for various new skills, technical information and services, contract research facilities, and interactions with other firms, equipment suppliers, standards' bodies, and so on. The setting up of this dense network of cooperation would require the development of special skills and a favourable economic, institutional and legal environment. The Group stated that all countries, particularly developing countries, could benefit from imported technologies to establish and strengthen local technological capability, including, *inter-alia*, the ability to acquire, absorb and adapt new and emerging technology, and to improve their international competitiveness. Such technologies would be obtained largely through foreign direct investment, including joint ventures and capital goods imports. However, in recent years, other channels of transferring technology such as licensing, management contracts, subcontracting and franchising have also grown in importance, including those within the framework of strategic technological partnerships.

9. The Working Group also concluded that foreign direct investment was attracted most strongly to those countries that had adopted measures to strengthen their domestic technological capability and created an overall policy framework conducive to innovation, investment in infrastructure, intellectual property protection, human capital formation and stable macroeconomic and regulatory environment. It was emphasized that government efforts had not necessarily elicited the desired effects in terms of additional investment and technology flows by firms. In most developing countries, the process of technological capability-building might be hampered by, *inter-alia*, declining rates of investment, misallocation of resources, external imbalances, lack of diverse and sophisticated skills, weak linkages between domestic R&D institutes and enterprises as well as unfavourable external factors. In that context, the problems faced by developing countries, particularly least developed countries, and countries in transition would require special consideration, particularly with respect to their need to formulate appropriate strategies on foreign direct investment and transfer of technology.

10. In light of the above findings, the Ad Hoc Working Group, in its general conclusions, confirmed that efforts towards promoting technology transfer and technological capability-building in developing countries and countries in transition need to be coupled with market-based trade and investment policy and pricing systems, and with a stable macroeconomic environment for business activity conducive to overall economic growth and employment. In order to maximize the efficient use of technology, technology transfer must take place, particularly in the case of developing countries, either as part of international commerce, or included within bilateral or multilateral assistance programmes.

11. While confirming that the role of government remained vital in the process of capability-building, the Group recognized that there was a need for closer collaboration between business, academia and government in order to take into account the motivations and needs of the production sector in the formulation of policies. However, differences in levels of economic and technological development may call for different sets of policy mix and approaches towards capacity-building.

12. In its conclusions, the Group also asserted that in the post-Uruguay Round period, intellectual property rights protection was deemed to constitute an important component of an environment conducive to international transfer of technology, including foreign direct investment. It stated that further studies and technical assistance, in collaboration with the World Trade Organization and the World Intellectual Property Organization, might be needed in order to elucidate the relationship between intellectual property rights and transfer of technology, particularly for the implementation of the Agreement on Trade-Related Aspects of Intellectual property Rights (TRIPS), taking into account the characteristics of contemporary knowledge, inventions and ownership.

B. The TRIPS Agreement

13. The Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations was adopted on 15 April 1994.[1] The Final Act includes the "Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods".[2] The Agreement reaffirms basic principles of intellectual property rights protection, national treatment and most-favoured-nation treatment (Articles 3 and 4). It sets up "adequate standards and principles concerning availability, scope and use of trade-related intellectual property rights" (Preamble, Article 9 et seq.). Moreover, it provides for "effective and appropriate means for enforcement of trade-related intellectual property rights" (Preamble, Article 41 et seq.), as well as for "reasonable procedures and formalities" for the acquisition and maintenance of intellectual property rights (Article 62). Thus, for the first time, protection of intellectual property rights in an international convention is linked to multilateral trade rights and obligations as a component of the international trading system.

14. Very much related to the negotiation on a code of conduct, the Agreement allows for "national measures" to prevent the "abuse" of intellectual property rights or practices which unreasonably restrain trade (Article 8, para. 2; Article 31(k)). It also addresses "licensing practices" which may have adverse effects on trade or on competition and which Member States may control through appropriate measures(Article 40). In doing so, the Agreement provides, for the first time in an internationally binding instrument, a number of rules on restrictive practices in licensing contracts. It recognizes that some licensing practices pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology (Article 40.1). The Agreement does not deal in detail with those practices that have been widely discussed in the process of the elaboration of the draft code of conduct. Therefore, countries are free to specify in their legislation "licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market". (Article 40.2). The last qualification, namely "adverse effect on competition" is tantamount to the so-called "competition test" for evaluating practices which may be deemed abusive. The provision in question provides a few examples: exclusive grant-back conditions, conditions preventing challenges to the validity and coercive package licensing.

15. Very much related to the above provision in TRIPS is chapter 4 of the draft code of conduct which has identified 14 practices that may be deemed restrictive: grant-back provisions; challenge to validity; exclusive dealings; restrictions on research; restrictions on use of personnel; price-fixing; restrictions on adaptations; exclusive sales or representation agreements; tying arrangements; export restrictions; patent-pool or cross-licensing arrangements and other arrangements; restrictions on publicity; payments and other obligations after expiration of industrial property rights; and restrictions after expiration of arrangement.[3]

16. The main divergence of views between the negotiating groups in the discussion on the draft code of conduct was on the conceptual approach to Chapter 4 dealing with the treatment of restrictive practices in transfer of technology transactions: the competition test *versus* the development test. The provisions in the TRIPS Agreement clearly adopts the "competition test", thus putting an

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[1] See GATT: Final Act Embodying the Results of the Uruguay Round on Multilateral Trade Negotiations, 15 April 1994.

[2] Annex 1C

[3] See Draft International Code of Conduct (TD/CODE TOT/47).

end to a long-standing international debate as to how to treat restrictive practices in transactions pertaining to the transfer of technology, which was the main outstanding issue in chapter 4 of the draft code.

III. FINAL CONSIDERATIONS AND SUGGESTIONS

17. The findings and conclusions of the Ad Hoc Working Group on the Interrelationship between Investment and Technology Transfer and the outcome of the Uruguay Round of Multilateral Trade Negotiations reviewed above shed light on the important evolution that has occurred in recent years in the perception of technology issues since the inception of the discussions on an international code of conduct on the transfer of technology. This evolution of thinking could contribute to reaching a decision on the future course of action Governments might wish to pursue in this area.

18. It should be recalled that the negotiations on an international code of conduct on the transfer of technology were launched by the General Assembly in the 1970s. At that time, the international milieu was drastically different from that which prevails today. The preamble, objectives and principles of the draft code reflect the concerns and motivations of different groups of countries in the sense that an international code of conduct should be an instrument through which to facilitate and promote the transfer of technology process, to reconcile differences in the approaches and experiences of countries concerning the transfer of technology, to give guidance and provide a framework for national legislation in the field of technology transfer and thus further the convergence of national laws, and to remedy abusive or anticompetitive practices in transfer of technology agreements. These motivations and concerns have found specific expression in the structure and coverage of the draft code, the centre piece of which was chapter 4, referred to above, which deals with restrictive practices. However, the position of the various groups of countries on the provisions dealing with transfer of technology transactions, particularly in the area of licensing practices, were influenced by existing policies and by prevailing conceptual approaches to international transfer of technology and technological development.

19. Recent years have witnessed a growing recognition of the importance of collaboration among enterprises in the transfer of technology and technological capability-building, the need to take advantage of opportunities to enter into various cooperative arrangements, the increasing emphasis in government policies on attracting foreign direct investment and promoting technology transfer, the relaxation of control on restrictive practices, the increasing concerns about the effect of technology on the environment and the growing accent on the creation of a stable legal framework conducive to transfer of technology which involves various economic agents in the process. Laws governing intellectual property rights are considered a key element in the strategic thinking of enterprises and Governments and an important means used by firms to safeguard their technological assets.

20. These developments, which have given rise to conceptual and policy shifts, are of unique relevance to the discussions on the draft code of conduct. This uniqueness arises, in particular, from the effect of such developments on international technology transfer which calls on the international community in the new economic environment to identify new parameters for a healthy competition that would be valid for all parties in an integrated world market. It would, therefore, be important to assess the specific implications of these developments on the international transfer of technology, particularly to developing countries, and assess their possible effects for enterprise and intergovernmental cooperation on the transfer of technology, including the identification of possible rules and principles which might enhance the stability and predictability required for such cooperation.

21. In light of the above, it is the view of the Secretary-General of UNCTAD that the negotiations on the current draft code of conduct be formally suspended. Alternatively, the General Assembly may wish to formally close the discussion on the code of conduct by publicly disseminating to interested groups the outcome of the work so far achieved by the United Nations Conference on an International Code of Conduct on the Transfer of Technology. It is also submitted for the consideration of Governments that a round-table of eminent persons, including policy-makers at the governmental and business levels as well as leading scholars in the area of transfer and development of technology, be convened to undertake a detailed and comprehensive examination of recent developments in order to reconcile past differences and to facilitate the achievement of a better understanding of the principles which should govern international cooperation in the area of technology today.